

**VIRGINIA MARAHAY, PETITIONER, VS. HON. MENELEO C. MELICOR,
AS PRESIDING JUDGE, COURT OF FIRST INSTANCE, BRANCH VI,
CARIGARA, LEYTE; ALIWANAG B. VALLERAMOS, LIGAYA BRAZIL Y
PEREZ...**

G.R. No. L-44980. February 06, 1990

Ponente: REGALADO, J.

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REGALADO, J.:

In this petition for certiorari under Rule 65 of the Rules of Court, petitioner imputes grave abuse of discretion on the part of respondent judge for issuing an order, dated February 27, 1976, in Civil Case No. C-1222, entitled "Virginia Marahay vs. Aliwanag B. Valleramos et. al.," dismissing the complaint; an order, issued on June 26, 1976, denying the motion for reconsideration filed by therein plaintiff; and an order, dated September 18, 1976, denying her second motion for reconsideration.

The records show that on June 20, 1974, petitioner filed with respondent court an action for recovery of real property against Aliwanag B. Valleramos. Later, the complaint was amended to implead and include other defendants, the other private respondents herein, as indispensable parties.[1]

After the issues were joined, the case was set for pre--trial on August 9, 1974, but this was deferred to a later date due to the absence of petitioner and her counsel.[2] On April 4, 1975, the same case was again scheduled for pre--trial but the same did not proceed due to the fact that petitioner appeared without her counsel while only one of the defendants appeared with counsel.[3] Later, informed of her lawyer's inability to attend the pre-trial, petitioner secured the services of another lawyer, Atty. Dominador Monjardin, who was present at the next pre-trial conference held on October 9, 1975.

Trial on the merits commenced on November 13, 1975 with the petitioner taking the witness stand on direct examination.[4] The defense failed to cross-examine her since the proceedings were cut short for lack of time and the continuation thereof was set for January 19, 1976.

On January 7, 1976, Atty. Monjardin filed a motion for postponement for the reason that he was taking the examination for government prosecutors in Manila on January 15, 1976, with a prayer that the case be reset either in the first week of January or the second week of February of said year.[5] The court eventually issued an order resetting the trial to February 18, 1976 with notice to petitioner and her counsel.[6]

On said date, petitioner appeared without counsel prompting private respondents, through their counsel, to move for the dismissal of the case for petitioner's alleged inability to prosecute her case and for apparent lack of interest.[7]

The motion to dismiss, which was made orally in open court, was submitted for resolution by the trial court. As earlier stated, the court below in its order dated February 27, 1976, dismissed the complaint. Two motions for reconsideration were filed by petitioner but the same were denied by respondent judge, hence, the present special

civil action.

The sole issue is whether or not respondent judge committed grave abuse of discretion amounting to lack or excess of jurisdiction in ordering the dismissal of the case and, consequently, denying petitioner the right to fully prosecute her case.

Before resolving said issue, it would be judicious to first clear the air of any misconception as to the procedural propriety of giving due course to this petition. An order of dismissal, whether right or wrong, is a final order. If it is erroneous, ordinarily the remedy of the aggrieved party is appeal, hence the same cannot be assailed by certiorari.[8]

Nevertheless, in the broader interests of justice, this Court has given due course to the present petition in consideration of the fact that this is not the first time we have passed upon a petition for certiorari, although the proper remedy is appeal,[9] where the equities warrant such extraordinary recourse. This is especially true where, as in the case, petitioner's affidavit of merits shows that she has a good cause of action, that her counsel's affidavit of merits avers justifiable reasons for his non-appearance at said hearing, and the trial court is faulted with gravely abusing its discretion to the extent of denying due process to therein plaintiff. Significantly, it was respondent judge himself who advised petitioner to avail of said remedy in his order dismissing petitioner's second motion for reconsideration,[10] obviously because appeal would not be a speedy and adequate remedy under the circumstances and considering that dismissals on technicalities are viewed with disapproval.

Turning now to the main issue, petitioner asseverates that respondent judge acted capriciously in denying her day in court by not postponing the continuation of the trial to some future time and giving her an opportunity to secure the services of another lawyer. Parenthetically, it is of record that petitioner is an invalid and moves around in a wheel chair.

The petition has the imprint of merit and the writ will lie.

Section 3, Rule 17 of the Rules of Court provides that —

"If plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with these rules or any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion. This dismissal shall have the effect of an adjudication on the merits, unless otherwise provided by the court."

It is, therefore, the absence of the plaintiff, and not the absence of the lawyer, which may warrant the dismissal of the case on the ground of non-suit.[11] In the case at bar, only the counsel for plaintiff was absent, plaintiff herself being in attendance in court.

While the aforequoted provision also provides sanctions for failure to prosecute for an unreasonable length of time, despite the presence of the interested parties, it cannot be said that such neglect or failing obtains in the present case. There is failure to prosecute when the plaintiff, being present, is not ready or is unwilling to proceed with the scheduled trial.[12] In the instant case, petitioner did not in the least manifest unwillingness to proceed with the hearing. Upon the call for appearances, petitioner responded that her counsel was in Manila and that he had not yet returned. Unschooled as she is in the vagaries of procedural law, petitioner indeed could not have responded otherwise nor done any better.

Considering all the attendant circumstances, the least that the trial court could have done was to afford petitioner a reasonable time, especially considering her handicap, to procure the services of another lawyer and, if necessary, with a stern warning that any further postponement of the trial shall cause the dismissal of the case.

The counter-argument that petitioner had already moved for postponements in the past should take into account the fact that the circumstances thereof were not of her making nor intended to be dilatory and that no substantial prejudice has been caused private respondents. Besides, judgments of non-suit are generally disfavored in the same manner that default judgments are discouraged. Thus, in *Padua vs. Erieta, etc., et al.*,^[13] we had the occasion to rule that:

"Courts should not brook undue delays in the ventilation and determination of causes. It should be their constant effort to ensure that litigations are prosecuted and resolved with dispatch. Postponements of trials and hearings should not be allowed except on meritorious grounds; and the grant or refusal thereof rests entirely in the sound discretion of the Judge. It goes without saying, however, that discretion must be reasonably and wisely exercised, in the light of the attendant circumstances. Some reasonable deferment of the proceedings may be allowed or tolerated to the end that cases may be adjudged only after full and free presentation of evidence by all the parties, especially where the deferment would cause no substantial prejudice to any party. The desideratum of a speedy disposition of cases should not, if at all possible, result in the precipitate loss of a party's right to present evidence and either in the plaintiff's being non-suited or of the defendant's being pronounced liable under an ex-parte judgment."

Indeed, after the issues had been duly joined, a plaintiff is entitled to present his case. Seldom does departure from orderly procedure bring satisfactory results.^[14]

While a court can dismiss a case on the ground of non prosecutur, the real test for the exercise of such power is whether, under the circumstances, plaintiff is chargeable with want of due diligence in failing to proceed with reasonable promptitude.^[15] In the absence of a pattern or scheme to delay the disposition of the case or a wanton failure to observe the mandatory requirement of the rules on the part of the plaintiff, as in the case at bar, courts should decide to dispense with rather than wield their authority to dismiss.

Further, when a party, without malice, fault, or inexcusable negligence, is not really prepared for trial, the court would be abusing its discretion if a reasonable opportunity is denied him for preparing therefore and for obtaining due process of law.^[16]

Time and again, we have emphasized that the rules should be liberally construed in order to promote their object and assist the parties in obtaining not only speedy but, more importantly, just and inexpensive determination of every action or proceeding.^[17]

ACCORDINGLY, the writ of certiorari is hereby granted and the order of the court a quo of February 27, 1976 dismissing petitioner's complaint, as well as its orders dated June 26, 1976 and September 18, 1976 denying petitioner's first and second motions for reconsideration, respectively, are hereby ANNULLED and SET ASIDE. Civil Case No. C-1222 is hereby REINSTATED and the Regional Trial Court which replaced Branch VI of the defunct Court of First Instance and/or in which this action is now pending is DIRECTED to continue with the trial of petitioner's action and decide the same on the merits in due course.

SO ORDERED.

Melencio-Herrera, (Chairman), Paras, Padilla, and Sarmiento, JJ., concur.

[1] Rollo, 66, 74.

[2] Ibid., 19.

[3] Ibid., id.

[4] Ibid., 17.

[5] Ibid., 4.

[6] Ibid., 17.

[7] Ibid., 17.

[8] Bacabac vs. Delfin, etc., et al., 1 SCRA 1194 (1961).

[9] Perlas vs. Concepcion, 34 Phil. 559 (1916); Alfonso vs. Yatco, 80 Phil. 407 (1948).

[10] Rollo, 29-30.

[11] Dayo, et al. vs. Dayo, et. al., 95 Phil. 703 (1954).

[12] Moran, Comments on the Rules of Court, 1979 Ed., Vol. 1, 521.

[13] 161 SCRA 458 (1988).

[14] Tagaruma vs. Guzman, et al., 60 Phil. 622 (1934).

[15] Moran, op. cit., 521; Perez, et al. vs. Perez, et al., 73 SCRA 517 (1976).

[16] Valerio vs. Secretary of Agriculture and Natural Resources, et. al., 104 Phil. 572 (1958).

[17] Tejero vs. Rosete, 137 SCRA 69 (1985).

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